AN APPROACH TO STATUTORY INTERPRETATION.

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The subject of statutory interpretation already has a considerable literature of its own. The greater part of this, however, is designed to meet the needs of the practitioner or the advanced student.[1] The present article has a different purpose. It is hoped that it will be useful to students who are taking their first steps in the law, and who are encountering the problem of statutory interpretation for the first time.

The Place of Statutes in the Law.

It would not be easy to give a short and complete description of a statute. However it can be said that, in one aspect, a statute is a formal document which, having passed through various stages in the houses of the appropriate Parliament, and having received the assent either of the King or his deputy, has become part of the law of the land. The layman, knowing that many laws do come into being in this way, is apt to assume that all law is statutory. Of course this is far from being the case, a very important part of the law having been developed by successive decisions of the courts. The courts administer the law as an entirety, and from the point of view of the litigant, it is immaterial whether the rule of law applied in his case has its origin in a statute or the common law. However, the fact that these two forms of law co-exist may be significant to the lawyer. Firstly, the fact that a statute is enacted against a background of common law often conditions its interpretation. Secondly, the courts appear to play a different rôle when applying a rule of law, according to whether the particular rule is statutory in origin or not. The distinction is valid though its importance may be exaggerated when it is enumerating and applying a rule of common law, a court affects merely to discover a rule already in existence, latent in previous decisions. However, in fact the court is not completely shackled by the previous decisions. Where there are no decisions directly in point, the court, in reaching a conclusion, actually makes new law, and where there are previous decisions, the court is bound only by the principles behind these decisions. The words in which the earlier judgments were framed have no special sanctity, and the court may, if it desires, reformulate the principles involved. The common law therefore has a certain elasticity—the court has in its hands the power to expand or adapt. It may be noted, however, that this power is exercised with caution, partly because of respect for the existing structure of the common law, and doubts as to the wisdom of revolutionary changes, and partly because of a natural reluctance to unsettle rights already acquired on the faith of the existing state of the law.[2] On the other hand, where the court is applying a statute, it is often supposed that it has no active function, and no freedom to modify the law it is applying. Certainly it is controlled

1. *e.g.* Frankfurter *Some Reflections on the Reading of Statutes,* (1947) 47 Col. L.R. p. 527. Friedmann *Statute Law and its Interpretation in the Modern State,* (1948) Vol. 26 Can. B.R. p. 1277.
2. The court purports to declare what the law has always been. The decision is therefore akin to retrospective legislation.

to a great extent by the language of the Act. However it goes too far to say, as some writers do, that the court's function is limited to finding " the intention of the legislature " and applying that intention. On examining the way courts actually approach the problem of interpretation it becomes apparent that their function is not purely mechanical. Very often it happens that the court is faced with a choice between interpretations, and here it must exercise an active discretion, guided by reference to appropriate materials, in selecting the meaning which will achieve the most satisfactory results. This is the case even though the Court merely purports to be finding the " intention of the legislature."

What is meant by " Intention of the Legislature " ?

At first sight the phrase " intention of the legislature " seems to have a clear meaning, but the meaning becomes less clear on closer examination. If we consider how a statute is passed, we notice that in most cases the proposal for the statute originates outside parliament, probably in a civil service department. A bill is prepared after consultations between the parliamentary draftsman, the appropriate minister, and members of the civil service. The civil servant is interested in the policy behind the new law ; the minister is interested both in this policy and the political difficulties which may be encountered when the bill is presented to Parliament ; the draftsman is charged with the task of expressing the desired policy in language which is clear, and which will, at the same time, minimize political difficulties. Even at this stage, therefore, as it is presented to Parliament, the bill is to a certain extent a compromise between various viewpoints ; and it retains this character. It may become law in the form in which it is presented or it may be amended. In neither case can it be assumed that the members of Parliament, in assenting to the bill, necessarily approve in its entirety either the policy of the bill as it appeared to the civil servant who first moved for the change, or the policy of the bill as it is expressed by the minister who introduces it to the House, or as it was represented in any of the speeches of individual members.

They may give their assent for widely differing reasons. Some members indeed, because they have little interest in the subject matter, or because the subject is too technical, may have little understanding of the measure and they may vote for it because of a vague Party loyalty, provided that there is nothing in the bill to arouse their antagonism.

Looked at in this light no clear intention of the legislature can be observed. All that is certain is that the legislature has agreed to the law in the words finally determined. The courts therefore have stated that they can only interpret these words—they must ignore the subjective intent of each of the persons who were responsible for the passing of the law. It may be that in adopting this attitude our courts go too far. It will be agreed that if the democratic process is to mean anything, the court should not accept the policy desired by the civil service, or the minister, as conclusive of the meaning of the Act. If it did, the way would be open for the commission of frauds on Parliament. On the other hand, a consideration of this policy might be helpful where the

meaning of the Act is not clear and where one of the possible meanings will further the desired policy, whilst another will frustrate it.[3]

The Interpretation of Statutory Language.

It is often said that in interpreting a statute a court may have recourse to three " rules " of interpretation. These are: the " plain meaning " or literal rule, which enjoins that the court must apply the plain meaning of the words of the statute; the " golden rule," which would permit a court to depart from the plain meaning when that meaning results in absurdity or injustice; and the rule in *Heydon's Case*[4], which prescribes interpretation according to the policy of the Act. All that these rules do, however, is to describe various aspects of the judicial process of interpretation. It is clear that they cannot themselves provide a clear answer to the problem of interpretation. This becomes obvious when we consider that the results achieved by the application of each of the three rules to the same problem may not be consistent. In other words, in such a case the court must make a choice between the rules, since it must ultimately conclude that the statute has one meaning, not three. The truth is that interpretation is essentially a complex process which cannot be described in a simple formula. Many factors must be considered before the meaning to be given to an Act is finally determined —in a particular case these factors may not tend in the one direction and this makes the task of interpretation more difficult because the court must then consider what weight is to be given to the various competing considerations. In some cases, these will balance out, and here the choice of meaning will be quite arbitrary. Fortunately such cases are exceptional, though a great number of the decisions involving problems of interpretation which are thought worthy of reporting fall within this category, and the reports therefore give a rather misleading impression as to the degree of uncertainty of interpretation.

Let us now consider in greater detail the various stages of the process of interpretation.

The first material the court considers is the language of the Act, taken as a whole. If this shows some obvious meaning, the acceptance of which will not lead to any absurdity or injustice, it is likely that the court will adopt this meaning without further discussion. But often the meaning is not as clear as this.

Questions may arise in connexion with the meaning of individual words. A word may have two meanings both in common use. Thus the word " accident " normally carries the meaning of a happening which is unintended, as opposed to one which is intended. However it sometimes means a happening unexpected by the person affected by it (though expressly designed by someone else). The majority of the House of

3. United States Courts sometimes refer to debates in Congress as an aid to determining the policy of the Act. See for example the dissenting judgment in *Caminetti v. United States,* (1917) 242 U.S. 470, in which reference to Congressional debates shewed that members of Congress had contemplated that the *Mann Act* was aimed at the prevention of commercialised vice and not immorality generally. (A report of this case is also contained in Dowling, Patterson and Powell *Materials on Legal Method* at p. 307.)
See also *Cleveland v. United States,* (1946) 329 U.S. 14.

4. (1584) 3 Rep. 7a.

Lords in *Trim School v. Kelly*[5] held that the death of a schoolmaster, resulting from an assault by some of his pupils, was an "accidental" injury arising out of and in the course of his employment, though it may have been intended by the perpetrators of the act. Similarly the word "sickness" may refer to bodily incapacity by reason of disease, or, in another sense, to bodily incapacity of any kind whether produced by disease or otherwise.[6] Again a word may have one meaning in common speech, and another in a particular trade. If the particular Act is directed to that trade it may be that the trade usage is to be preferred, but this is not necessarily so. According to Dixon J., if the trade meaning is wider than the ordinary meaning it will be more readily accepted than if it is narrower. "For an extention of meaning involves no abandonment of the use in respect of things to which it would in any case apply; but a uniformly restricted application is necessary in order to establish that it has among them a narrower meaning and that meaning only."[7]

But the problem goes deeper than this. Even where words are not obviously ambiguous in the sense we have been discussing, the meaning of the language of an Act may not be clear. Thus doubts may be caused in relation to a word which apparently has a definite meaning, because of the context in which the word is found, since it may not be clear whether the word is to be understood in its ordinary meaning, or in some artificial or restricted meaning.[8] In *Muir v. Keay*[9] it was held that, in an Act requiring that houses used for "refreshment, resort and entertainment" of the public should be licensed, the word "entertainment" merely involved the reception and accommodation of the public—that is, it was the correlative of "refreshment and resort." This conclusion was certainly not inevitable—in normal usage the word "entertainment" would involve the provision of some diversion other than food and drink.

In a very large number of the cases depending on Statute coming before the courts, the meaning of the language used is found capable of bearing more than one interpretation. In these cases the literal meaning of the language cannot provide a final solution. However, even in those cases where there is a single plain meaning, it may be doubted whether a court should be content with that meaning, unsupported by other considerations. The Statute does not operate in a vacuum. It operates in a context of other law, common law and Statute, and it is designed to achieve some social purpose. A responsible court will have regard to these factors and will not rest its judgment solely on a literal interpreta-

5. [1914] A.C. 667. For a discussion of this and other cases of ambiguity, see (1945) 61 *L.Q.R.* p. 180 *et seq.*
6. *Maloney v. St. Helens Industrial Co-op. Society*, (1932) 49 T.L.R. 22, where Macnaghten J. held that "sickness" had the latter meaning in an agreement to pay wages "during sickness." He pointed out that the word has this meaning in the marriage service, where the words "sickness" and "health" are obviously complementary. It would be absurd to argue that the husband's obligation to cherish his wife was in abeyance where she was incapacitated by some cause other than disease.
7. *Herbert Adams Pty. Ltd. v. Federal Commissioner of Taxation*, (1932) 47 C.L.R. 222, at p. 229. In this case the High Court held that a provision exempting from Sales Tax "pastry, but not including cakes or biscuits" did not exempt from tax, the sale of "sponges." The court agreed that "pastry" was to be understood in the trade sense which was wider than its meaning in common speech. On the other hand it held that "sponges" were "cakes" although trade usage would normally restrict the meaning of "cakes" to a class of comestibles which would exclude sponges.
8. In other cases the context will resolve doubts e.g. *Moore v. Hubbard*, [1935] V.L.R. 93.
9. (1875) L.R. 10 Q.B. 594.

tion. Acting in this way it may feel impelled to depart from the literal meaning. Thus the Victorian Supreme Court in *Anstee v. Jennings*[10] applied the *Licensing Act* 1928 in a way which was not authorized by the literal meaning of the language, but which was clearly in conformity with its purpose. The Act provided that a licensee charged with serving liquor on a Sunday should not be convicted if the customer served was a *bonâ fide* traveller, " or if the defendant believed that such was the fact." The person charged in this case, the licensee of the hotel, was absent from the hotel at the time the alleged offence was committed, and had no belief as to the customer's status. The court held that she should be acquitted, if it were shewn that the person supplying the liquor believed the customer to be a *bonâ fide* traveller. This eminently sensible conclusion involved a departure from the obvious meaning of the words of the Act.

Another case which shews the importance of going beyond the plain meaning of the language is *Thomas v. The King.*[11] In this case the accused had been found guilty of bigamy, an offence created by statute. The relevant portion of the statute read as follows :—

" Whosoever being married goes through the form or ceremony of marriage with any other person during the life of . . . his wife shall be guilty of felony."

It was established that the accused had gone through the ceremony of marriage with another woman during his wife's lifetime ; but the jury was also satisfied that the accused had believed, honestly and on reasonable grounds, though mistakenly, that he was not then married. He knew that his wife had been married before and he was told by her, and believed, that this marriage had not been dissolved at the time of his marriage to her. In fact the wife's first marriage had been dissolved, and therefore the accused's marriage was valid. If the facts had been as he believed them to be, it is clear that the accused would have been guilty of no offence in going through the second ceremony of marriage, since his action would not be within the words of the section. On the facts as they actually existed, however, the case appeared to be directly covered by the plain meaning of the section. However, a gloss, well-accepted in the case of statutes creating criminal offences, was read into the section. This gloss derives from the purpose of such penal Acts, which is to secure the observance of certain rules of conduct by a threat of punishment if these rules are disregarded. This threat has no operation on the mind of a person who innocently disregards the rule, because he believes that he is doing an act which is not prohibited by the rule. To punish such a person would therefore involve useless cruelty without furthering the social objective of the legislation. The majority of the High Court applied this gloss and concluded that the appellant was not guilty of bigamy. It may be noted that this result was reached not by applying the plain meaning of the language, but by recourse to the purpose of the Act and to principles of common law. Thus Dixon J. stated that the question was one going " deeply into the principles of the common law."[12]

10. [1935] V.L.R. 144.
11. (1937) 59 C.L.R. 279.
12. *ibid.*, at p. 299.

It is interesting to contrast the majority decision in this case with the dissenting judgment of Evatt J. which shews a greater reliance on the actual language used. Evatt J. was of the opinion that a mistaken belief held by the accused that his wife was dead at the time he entered into the second marriage would have availed as a defence,[13] but that a mistaken belief in the invalidity of the first marriage would not. This curious distinction rested not on grounds of justice or the social purpose of the Statute, but on the accidents of drafting. In the second case, so Evatt J. held, it could be said that the accused intended to commit the very act prohibited, namely going through the ceremony of marriage during the lifetime of the woman who was his wife. In the first case this would not be so, since the marriage was not, in the intention of the accused, " in the lifetime " of the former wife.

It is submitted that this approach, with its emphasis merely on the words used without regard to the policy of the Act, is unsatisfactory, and that the view of the majority is to be preferred.

This case is one illustration of a departure from plain meaning in the interests of achieving a just and reasonable result and other cases of a similar kind may be found. These cases will generally be found to fall within certain well recognised categories. In relation to these categories the courts have become accustomed to varying the plain meaning by applying " presumptions " as to the meaning of the Act, these " presumptions " being based on considerations of justice or convenience outside the actual language of the Statute.[14] This activity of the courts is reconciled with the orthodox theory of interpretation by the argument that the legislature must know that the presumption will be applied, if it is not clearly excluded. But no apology for the action is really needed. The only valid objection to departing from the plain meaning of the language is that the real policy of the legislation may be frustrated. The courts must therefore be wary of a too free interpretation, and they must certainly avoid any attempt to impose on the legislation their own views as to the policy the legislature should have adopted. However there can be no objection to interpretation which, consistently with the policy of the Statute, achieves just and reasonable results. Indeed there is every reason to reject a slavish acceptance of the meaning of the language used in a statute where that meaning results in purposeless injustice. However it must be admitted that British Courts, except in cases where the presumptions are applicable, have often accepted a literal interpretation as binding on them,[15] placing the blame for resulting injustice on the parliament which, not being omniscient, has failed to provide satisfactorily for the particular case being dealt with.

Where, for any reason, the language is held to be ambiguous, the Court may and often does, refer to considerations of justice and the policy of the Act in determining which meaning is to be preferred. In some cases, recourse to these considerations is not helpful and the court

13. This was well-settled: *Reg. v. Tolson*, (1889) 23 Q.B.D. 168.
14. *e.g.* The presumptions that a statute is not intended to operate exterritorially ; or that a statute is not intended to be in breach of a rule of international law.
15. In extreme cases, judges have sometimes accepted the literal meaning of the language as their only guide, even where the various members of the court disagreed as to what that meaning was. See *Ellerman Lines v. Murray*, [1931] A.C. 126.

is forced to make an arbitrary selection of meaning. If we consider problems arising under taxing Acts we may note some cases where the Act takes the form of a taxing Act, but in fact is designed to achieve some purpose other than gaining revenue. Thus in *Newman v. Marrable*,[16] the Act, under the guise of imposition of customs duties on imported "buttons finished or unfinished," was designed to protect the British button industry. Recognition of this policy assisted Horridge J. to the conclusion that imported button blanks which were nearly but not quite buttons—and which required little extra work to be done to make them buttons—were within the prescription of the Act. On the other hand, the taxing Act which is a taxing Act and nothing else has a neutral character. It is true that it is designed to bring in revenue, but it cannot be inferred from this that every conceivable circumstance is to be the occasion for exacting tax. Therefore it has been said in relation to this kind of Act that policy is to be disregarded. "One has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."[17]

Acts with this colourless character are however exceptional, and in the majority of Acts the policy will be disclosed either by the title, or general language, or as a logical deduction from its effects ; and this will assist in determining the meaning to be given to a doubtful clause. The recent Victorian case of *Durston v. Beqir*[18] affords a good example of this. The defendant had been charged with an offence under the *Transport Regulation Act* 1933, section 39 (1) of which provided :—

"It shall not be lawful for any person to drive . . . any motor car which is used for the carriage . . . of goods—

. . . (*c*) so that the driver has not at least ten consecutive hours for rest in any period of twenty-four hours calculated from the commencement of any period of driving."

Section 39 (2) provided that "For the purposes of this section— . . .

(*b*) any time spent by the driver on other work in connexion with the vehicle including . . . any time spent on the vehicle while on a journey . . . shall be reckoned as time spent in driving."

It was shewn that the defendant, starting at 5 p.m. on the 9th March, had driven a motor vehicle, carrying goods, from a country town to Melbourne and was returning with the vehicle, though not as driver, when the vehicle was intercepted by the police at 2.30 p.m. the following day. The defendant had had only eight hours' rest in Melbourne before setting out on the return trip and the prosecution contended that he had infringed section 39 (1). It was argued that by sub-section (2), the time spent on the return journey was to be reckoned as time spent in driving and that therefore the defendant had driven so that he could not have had the required ten consecutive hours for rest. Fullagar J. found that no offence had been committed. The judgment purports to be

16. [1931] 2 K.B. 297.
17. *Per* Rowlett J. in *Cape Brandy Syndicate v. I.R.C.*, [1921] 1 K.B. 71, quoted by Viscount Simon L.C., [1945] 2 All E.R. 506.
18. [1949] A.L.R. 66.

based mainly on the plain meaning of the word "drive" which refers to an actual driving, and not a constructive driving. However, there can be little doubt that this interpretation was assisted by a consideration of the policy of the Act, which from its terms was clearly the prevention of the dangers which might arise if drivers were to drive while suffering from excessive fatigue. These dangers do not arise where a person is merely travelling on a vehicle, although if he then actually resumes driving, it is logical to take account of the fatigue caused by travelling and sub-section (2) entitles the court to do so. The judge laid little stress on the absurdity which would result from an acceptance of the interpretation urged by the prosecution, that a person travelling on the vehicle should be "deemed to be driving." However, he did point out that this interpretation would involve the result that "a person would be guilty of an offence although he never actually drove a vehicle at all, was not employed as a driver and could not drive a motor car."[19] This line of reasoning could have been used to reinforce his decision.

It is probably unnecessary to indulge in any further elaboration of cases. It is hoped that enough has been said to make it clear that the student who hopes to become proficient in the art of interpretation, or in predicting the interpretation which probably will be given by a court, cannot be content with learning a few "rules of interpretation." These rules are merely convenient labels for various aspects of the process of interpretation and it is this actual process which the student must learn to apply. In his early attempts, he will find himself handicapped by gaps in his knowledge of the general law. However, he should soon come to recognise the principal categories of statutes, where the courts have in the past felt themselves free to depart from a literal interpretation. He should realise also that the meaning of a statute is not merely a matter of the meaning of words. It cannot but be influenced by the fact that the Statute will affect the rights and duties of individuals, and that it has its operation in a society in which a complex system of law is already in force.

19. *ibid.*, at p. 69.